Filed 6/8/10 Kelmar v. Bowden CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CHERYL KELMAR, Plaintiff and Appellant, v. TIM BOWDEN, et al., Defendants and Respondents.	H034245 (Santa Cruz County Super. Ct. No. CV155181)

This is an appeal from an order granting respondents' motion to enforce a settlement agreement. For reasons explained below, we dismiss the appeal as moot.

BACKGROUND

The parties to this appeal are appellant Cheryl Kelmar and respondents Tim Bowden and Niki Bowden. Appellant initiated the underlying litigation against respondents and others, following her real estate purchase and subsequent disputes over easements.

Settlement; Enforcement

All parties to the underlying litigation executed a settlement agreement in December 2008. Concerning the parties to this appeal, the gist of the settlement

was that respondents would pay appellant $10,000 (out of $52,000 total), and appellant would provide respondents with deeds acknowledging their easements. The parties agreed to maintain the terms of the settlement agreement in confidence. After respondents paid appellant the money due under the settlement agreement, she refused to sign the deeds.

In March 2009, respondents sought and obtained an order enforcing the settlement. The formal order was entered in April 2009. Consistent with the terms of the settlement agreement, the order also enjoined appellant "from placing on You Tube any information concerning this action." The order also included an award of $1,400 in attorney fees.

Appeal

Appellant brought this appeal from the order. Representing herself on appeal, appellant argues that the trial court (1) denied her due process by treating respondents' motion to enforce the settlement as if it were unopposed and (2) misinterpreted the settlement agreement.

Respondents disagree. Addressing appellant's first argument, respondents maintain that she was properly served via facsimile. As for appellant's second argument, respondents characterize it as a "rehash" of her earlier contentions and they maintain that it is not a cognizable claim in an appeal from an order enforcing a settlement.

Motion to Dismiss Appeal as Moot

After appellate briefing was complete, respondents moved to dismiss the appeal as moot. According to the declaration of respondents' attorney in support of the dismissal motion, appellant "no longer has any interest in the [subject] property" because it was foreclosed and sold at a trustee sale in November 2009. That declaration further states that appellant obtained a discharge in bankruptcy in

October 2009, which wiped out respondents' monetary claims against appellant, including the fee award. A copy of the discharge order is attached to the declaration.

As a result of these developments, respondents maintain, the appeal is moot. Respondents seek dismissal on that ground. As part of the dismissal motion, respondents also seek sanctions based on appellant's refusal to voluntarily dismiss her moot appeal.

Appellant filed written opposition to respondents' motion to dismiss the appeal as moot. In it, appellant acknowledges losing the subject property to foreclosure in November 2009. But she argues that the dismissal motion contains other statements that are "untrue." For one thing, concerning the $1,400 fee award in the challenged order, appellant contends that the award is in the nature of a sanction, which she "attempted to discharge," but which is not dischargeable in bankruptcy. For another thing, regarding the March 2009 hearing that culminated in the challenged order, appellant maintains that respondents' "characterization of the actual events are not substantiated." She claims to have provided "substantial circumstantial evidence" that opposing counsel – including respondents' attorney – "fraudulently modified the disputed settlement agreement in order to cover up their unethical behavior of intentionally serving Appellant at an old fax number," when her new contact number was known.

Moreover, appellant argues, "the consideration behind the settlement agreement is still at issue. Therefore, because [respondents] (i) have recordable deeds, which arose from the disputed agreement; (ii) can sue Appellant for publicly speaking out about this case in the future, according to the terms of the settlement agreement; (iii) Appellant has provable damages as a result of this appeal; and (iv) Appellant did not discharge court sanctions with her bankruptcy, the controversies are not moot."

By letter of April 12, 2010, this court requested further information from appellant. That letter states: "In connection with its consideration of respondents' motion to dismiss the appeal as moot, the court seeks further information concerning the $1,400 award of attorney fees and costs, which was contained in the order of April 6, 2009 granting respondents' motion to enforce the parties' settlement. Specifically, the court requests evidence from appellant . . . demonstrating that the award was not discharged in her bankruptcy."

Appellant responded with a request for judicial notice of the above letter, together with a memorandum of points and authorities and her declaration.[1] In argument, appellant argues that the burden is on respondents to prove that their claims were discharged and that "the court cannot shift the burden of proof" to her. In her declaration, appellant states: "I do not have any document to prove my sanctions . . . have NOT been discharged from my bankruptcy."

In reply, respondents opposed appellant's submission, attaching (1) a copy of appellant's bankruptcy petition, which lists them as creditors with a $1,400 claim, and (2) a duplicate copy of appellant's bankruptcy discharge order.[2] Those documents are attached to respondents' opposition, not to a declaration.

Appellant submitted a reply, which we accepted for filing despite the fact that we had neither solicited nor preauthorized it. In this reply, appellant made the factual argument that respondents "evidence fails to meet the standard of proof

---

[1] We hereby grant appellant's request for judicial notice of this court's letter of April 12, 2010. We note that appellant has filed a number of other requests for judicial notice requests in this court, some of which are still pending. In view of our disposition of this appeal as moot, we need not and do not rule on the pending requests.

[2] In their opposition, respondents also (1) noted appellant's continuing failure to properly serve them; and (2) waived any claim to the $1400 fee award, to the extent that it was not discharged in bankruptcy.

required to sustain a Motion to Dismiss," and the legal argument that "material questions remain."

DISCUSSION

I. Legal Principles

"An appeal should be dismissed as moot when the occurrence of events renders it impossible for the appellate court to grant appellant any effective relief." (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479; *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 214.)

But the rule of dismissal for mootness does not apply where "despite the happening of the subsequent event, there remain material questions for the court's determination." (*Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541; *Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga, supra,* 82 Cal.App.4th at p. 480; *Cinnamon Square Shopping Center v. Meadowlark Enterprises* (1994) 24 Cal.App.4th 1837, 1843.) "A material question exists when the judgment, if left unreversed, would preclude a party from litigating its liability on an issue still in controversy." (*Viejo Bancorp, Inc. v. Wood* (1989) 217 Cal.App.3d 200, 205.)

Furthermore, even if a case is technically moot, the court has inherent power to decide it where the issues presented are important and of continuing interest. (*Burch v. George* (1994) 7 Cal.4th 246, 253, fn. 4.) That is particularly true when the issue is likely to recur yet evade review. (See, e.g., *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1190, fn. 6.)

The party moving for dismissal bears the burden of demonstrating that the appeal is moot. (See *Scott v. Renz* (1945) 67 Cal.App.2d 428, 431 ["the burden is on the moving party in the trial court"]; *Aguilar v. Atlantic Richfield Co.* (2001) 25

Cal.4th 826, 850 ["a party who seeks a court's action in his favor bears the burden of persuasion"].)

II. Analysis

A. Factual Predicate for Motion

As noted above, respondents have posited two mooting events: forclosure of appellant's interest in the affected real property, and discharge of their monetary claims against appellant in her bankruptcy. Appellant admits that she lost the subject property to foreclosure. (See *County of San Luis Obispo v. Superior Court* (2001) 90 Cal.App.4th 288, 295 ["loss of the property by foreclosure prevents the trial court from granting . . . any relief by administrative mandate"].) But she challenges the sufficiency of respondents' showing that their monetary claims against her were discharged in bankruptcy.

1. Respondents' showing

In support of their dismissal motion, respondents submitted their attorney's declaration, which states in part: "Appellant's bankruptcy was completed, and Respondents' monetary claims were discharged." Attached to the declaration is an exhibit entitled "Discharge of Debtor," which is a copy of the bankruptcy court order discharging appellant. The order does not list the specific debts discharged, however.

Appellant treats this showing as inadequate. In her words, respondents' attorney "either has the evidence to prove the facts necessary to sustain his Motion to Dismiss, or he does not."

To the extent that appellant is challenging the declaration of respondents' attorney as factual support for the dismissal motion, we reject that challenge. As the governing rule implicitly recognizes, an adequate declaration may be sufficient evidentiary support for an appellate motion. The rule thus provides: "A motion

must be accompanied by a memorandum and, if it is based on matters outside the record, by declarations or other supporting evidence." (Cal. Rules of Court, Rule 8.54(a)(2); see *Clyde v. Clyde* (1948) 85 Cal.App.2d 249, 250 [finding adequate support for motion to dismiss appeal, based in part on "an affidavit made by respondent's attorney"]; *Radford v. Crown City Lumber & Mill Co.* (1958) 165 Cal.App.2d 18, 21 [granting unopposed motion to dismiss appeal, where it was supported by "the affidavit of one of the attorneys for respondent"].) To that extent, the rule is consistent with established motion practice in the trial court. "Motions ordinarily are heard on affidavits, alone." (*McLellan v. McLellan* (1972) 23 Cal.App.3d 343, 359; *id.* at p. 360 ["motion was properly granted on the basis of the declaration" by the attorney alone].)

In sum, an attorney declaration may suffice to support a dismissal motion. The declaration filed in this case adequately establishes that respondents' monetary claims against appellant were discharged in bankruptcy.

2. Appellant's response

Given respondents' prima facie showing, the burden shifted to appellant to counter respondents' evidence. Appellant has not carried that burden.

Appellant declares her lack of "any document" proving that the fee award was not among the claims discharged in her bankruptcy. Pointedly, however, appellant does not deny that the award was discharged. Appellant's declaration thus addresses only documentation, not the key underlying fact. Furthermore, appellant's declaration was not made under penalty of perjury. (Cf. *Ancora-Citronelle Corp. v. Green* (1974) 41 Cal.App.3d 146, 148 ["an injunction may issue *only* upon a satisfactory showing of sufficient facts *under oath*"].)

As noted above, appellant argues that the $1,400 fee award was a non-dischargeable sanction. That argument is not persuasive. For one thing, as just explained, there is no evidence to support it. For another thing, on its face, the

order states that the money was awarded "as and for attorneys fees incurred in bringing this motion" to enforce the settlement. The settlement agreement specifically provides for such an award, saying: "In such an action for enforcement of this Agreement, the prevailing party shall recover attorney fees and costs, and damages." (See *Osumi v. Sutton* (2007) 151 Cal.App.4th 1355, 1361 [in awarding fees and costs following hearing to enforce settlement, court "impliedly found that Appellant was the breaching party and Respondent the prevailing party"].)

3. Effect

As a consequence of appellant's discharge in bankruptcy, respondents cannot recover the fees awarded in the April 2009 order. "A discharge order under the Bankruptcy Code: extinguishes the debtor's personal liability with respect to his creditor's claims; voids any judgment to the extent of the debtor's personal liability for a discharged debt; and enjoins the commencement or continuation of civil suits against the debtor personally to recover any discharged debt." (*Hurley v. Bredehorn* (1996) 44 Cal.App.4th 1700, 1703.) For that reason, in the usual case, "an appeal from entry of a judgment on a debt which has been discharged in bankruptcy is moot and must be dismissed." (*Id.* at p. 1705.)

Under these circumstances, we find a sufficient evidentiary basis for a factual determination that events subsequent to the challenged order have rendered this appeal moot. We therefore consider whether a legal predicate for dismissal exists here.

B. Legal Predicate for Motion

From a legal perspective, the pivotal question is whether, "despite the happening of the subsequent event, there remain material questions for the court's determination." (*Eye Dog Foundation v. State Board of Guide Dogs for the Blind,*

supra, 67 Cal.2d at p. 541.) As noted above, appellant rests her appeal on two grounds: (1) denial of due process and (2) misinterpretation of the settlement agreement. As we now explain, neither claim entitles her to relief after the mooting events.

1. Due Process

Appellant claims a due process violation, asserting that respondents failed to properly serve her with the motion to enforce the settlement and that the court erred in treating the motion as unopposed. On the record before us, we question the merits of that claim.[3] More to the point, since appellant no longer has any

---

[3] Appellant appeared at the March 2009 hearing on the motion and requested a continuance, arguing that she had been served at an old fax number (Bill's Copy Shop rather than Kinko's) and had only learned of the motion because she came to court the week before. According to appellant's opposition papers, in October 2008, she "had agreed . . . to accept faxed copies at Bill's Copy Shop for the purpose of discovery and a specific motion only" but in December 2008, she "used only the fax service at Federal Express Kinko's in Santa Barbara" – the number used to send her the December 2008 settlement agreement.

Respondents' attorney disputed that argument at the March 2009 hearing, asserting that appellant was properly served. That assertion finds support in the record. The respondents' appendix contains a minute order from January 2008 instructing counsel to serve appellant "by fax regardless of past orders regarding discovery." Here, respondents filed proof of faxed service on appellant at a number previously used by her. "It has been held that the filing of a proof of service creates a rebuttable presumption that the service was proper." (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1441; but see *id*. at p. 1443 ["trial court properly determined that the defendants had not been served"].) On these facts, the trial court was entitled to find proper service.

Even assuming that appellant was not properly served, it is hard to discern any prejudice. She was aware of the hearing sufficiently in advance to file opposition papers, which the court struck for her failure to serve them on respondents. Appellant's own papers show that she personally found out about the motion on March 6th and that the faxed notice was retrieved from Bill's Copy Shop and delivered to her on March 9th – four days before the hearing. So far as appears from the partial copy of appellant's opposition that appears in the appellant's appendix, the only point raised there is her claim of insufficient notice, though she did state that she needed time to "properly prepare her opposition."

interest in the subject matter of the settlement agreement, claims arising from its enforcement are moot.

2. Interpretation of Settlement Agreement

Appellant's second appellate claim is that the court misinterpreted the settlement agreement. That claim is moot as well.

"A court ruling on a motion under Code of Civil Procedure section 664.6 must determine whether the parties entered into a valid and binding settlement." (*Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1182.) The court "may consider the parties' declarations and other evidence in deciding what terms the parties agreed to, and the court's factual findings in this regard are reviewed under the substantial evidence standard." (*Ibid.*; *Osumi v. Sutton, supra,* 151 Cal.App.4th at p. 1360.)

In this case, appellant makes no claim that she did not agree to the terms of the settlement agreement. Appellant's main challenge to the agreement is that its provisions for an exclusive easement are ambiguous. But since appellant no longer has any interest in the easements or their exclusivity, her challenge on that ground is technically moot. (Cf. *Giles v. Horn* (2002) 100 Cal.App.4th 206, 228 [case moot where contracts had been fully performed and had expired].)

Appellant nevertheless argues that "the controversies within this appeal remain." She maintains that "the language of the settlement agreement still requires interpretation" to test the consideration underlying the agreement, because of the possibility of future suits against her "for ambiguous deeds" and because she "has valid damages as a result of this appeal" including damages for misrepresentation during settlement negotiations. Further, she says, "as a result of this case, Appellant is calling for court reform."

These facts (appearance at the hearing and opposition on procedural grounds only) do not demonstrate that appellant was prejudiced either by the claimed improper service or by the court's conduct of the hearing.

None of these challenges to the enforcement order requires us to decide this appeal. First, the possibility of future suits does not revive this moot appeal. (See *Safai v. Safai* (2008) 164 Cal.App.4th 233, 243 [court will not render advisory opinion].) Second, appellant's claim of damages arising from this appeal is not cognizable. As the California Supreme Court has long held, a moot "appeal will not be retained solely to decide the question of liability for costs." (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 134; cf. *Cinnamon Square Shopping Center v. Meadowlark Enterprises, supra,* 24 Cal.App.4th at p. 1843, fn. 2.) Finally, appellant's call for court reform is not based on an actual controversy with respondents; it is outside the bounds of this case and not justiciable. (See *Stonehouse Homes v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 540; *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 69.)

C. Inherent Power to Decide Moot Appeal

As noted above, the court has inherent power to decide a moot case that presents important issues of continuing interest. (*Burch v. George, supra*, 7 Cal.4th at p. 253, fn. 4.) Appellant urges us to exercise that power here, based on her assertion that the word "exclusive" in the settlement agreement is being misconstrued and abused. In support of that argument, appellant cites respondents' "continued behavior in having their neighbors sign ambiguous and complicated deeds, which [respondents' attorney] prepared, in order to acquire land from their neighbors without their neighbors having the actual intent of giving up their land."

We decline to exercise our inherent power to decide this moot appeal. Appellant's claim is "essentially factual, a recognized basis to refuse to decide a moot case." (*Giraldo v. Deptment of Corrections and Rehabilitation* (2008) 168 Cal.App.4th 231, 259.) Resolution of such a claim is "unlikely to provide

guidance for future . . . disputes, because the . . . issues presented . . . are essentially factual in nature and therefore require resolution on a case-by-case basis." (*MHC Operating Limited Partnership v. City of San Jose*, *supra*, 106 Cal.App.4th at p. 215; *Giles v. Horn, supra,* 100 Cal.App.4th at p. 228.)

III. Sanctions

As noted above, respondents have requested sanctions against appellant, based on her refusal to dismiss her moot appeal. Respondents' request for sanctions is contained in the memorandum of points and authorities submitted in support of their dismissal motion.

"An appeal that may have been meritorious when commenced can become frivolous by the occurrence of subsequent events which render the appeal moot." (*Guardianship of Melissa W.* (2002) 96 Cal.App.4th 1293, 1301.) In such cases, the appellant has a duty to "promptly to dismiss" the appeal to avoid burdening respondents and the court with the "time and expense of reviewing" a matter that has become moot. (*Wax v. Infante* (1983) 145 Cal.App.3d 1029, 1031; accord, *Guardianship of Melissa W.*, at p. 1301.) When the appellant fails to do carry out that duty, sanctions are appropriate. (*Guardianship of Melissa W.*, at p. 1301.)

Under the governing rules, the reviewing court "may impose sanctions . . . on a party or an attorney for" specified conduct, including taking a frivolous appeal. (Cal. Rules of Court, rule 8.276(a)(1).) "A party seeking sanctions on appeal must file a separate motion for sanctions that complies with the requirements of" the applicable rules. (*Kajima Engineering and Construction Company, Inc. v. Pacific Bell* (2002) 103 Cal.App.4th 1397, 1402, citing predecessor rules.) Such a motion "must include a declaration supporting the amount of any monetary sanction sought and must be served and filed before any order dismissing the appeal but no later than 10 days after the appellant's reply

brief is due." (Cal. Rules of Court, rule 8.276 (b)(1).) A party failing to comply with these requirements is "not entitled to be heard on the subject." (*Kajima Engineering and Construction Company, Inc. v. Pacific Bell,* at p. 1402; see also, e.g., *Bak v. MCL Financial Group, Inc.* (2009) 170 Cal.App.4th 1118, 1127-1128, *In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 180; *Leko v. Cornerstone Bldg. Inspection Service* (2001) 86 Cal.App.4th 1109, 1124.)

Here, respondents "failed to follow the proper procedure for requesting sanctions," as set forth in the governing rule. (*Committee to Save Beverly Highlands Homes Ass'n v. Beverly Highlands Homes Ass'n* (2001) 92 Cal.App.4th 1247, 1273, fn. 10.) They did not file a separate motion, nor did they file a supporting declaration specifying the amount sought. "For this reason, we must decline their request" for sanctions. (*Ibid.*) Respondents nevertheless "are to recover their costs on appeal." (*Id.* at p. 1273.)

DISPOSITION

This appeal is dismissed as moot. Respondents are awarded their costs on appeal.

_____

McAdams, J.

WE CONCUR:

_____

Elia, Acting P.J.

_____

Mihara, J.